

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Noah Kim	Team: Squad #9	CCRB Case #: 201907293	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 08/15/2019 9:00 PM	Location of Incident: Outside 1058 Pacific Street	Precinct: 77	18 Mo. SOL 2/15/2021	EO SOL 10/2/2021	
Date/Time CV Reported Fri, 08/16/2019 10:35 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 08/16/2019 10:35 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Joshua Zucker	15733	958202	077 PCT
2. POM Christophe Messina	01448	961950	077 PCT
3. SGT John Nicolosi	03027	950949	077 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Nicholas Loweth	04250	944749	077 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Christophe Messina	Discourtesy: Police Officer Christopher Messina spoke discourteously to § 87(2)(b)	
B.POM Joshua Zucker	Discourtesy: Police Officer Joshua Zucker spoke discourteously to § 87(2)(b)	
C.POM Christophe Messina	Force: Police Officer Christopher Messina used physical force against § 87(2)(b)	
D.POM Christophe Messina	Force: Police Officer Christopher Messina used physical force against § 87(2)(b)	
E.POM Joshua Zucker	Force: Police Officer Joshua Zucker used physical force against § 87(2)(b)	
F.SGT John Nicolosi	Abuse: Sergeant John Nicolosi searched the vehicle in which § 87(2)(b) was an occupant.	

### Case Summary

On August 16, 2019, § 87(2)(b) filed this complaint with the CCRB via phone [BR01]. This complaint was reassigned to the undersigned on September 23, 2020, after Investigator Leilani Rhodes' departure from the agency [BR02].

On August 15, 2019, at approximately 9:00 p.m., at 1058 Pacific Street in Brooklyn, Police Officer Christopher Messina and Police Officer Joshua Zucker, both of the 77th Precinct, approached § 87(2)(b) and § 87(2)(b) who were working on § 87(2)(b)'s truck on the street with § 87(2)(b)'s vehicle parked on the sidewalk next to it. After § 87(2)(b) stated that he did not have him identification on him and refused to provide his name, PO Messina told § 87(2)(b) "Put your fucking hands behind your back." (**Allegation A: Discourtesy**, § 87(2)(g)). PO Zucker told § 87(2)(b) "Get the fuck off my arm" and "Shut the fuck up" (**Allegation B: Discourtesy**, § 87(2)(g)). PO Messina and PO Zucker grabbed § 87(2)(b) by his arms and attempted to pull them behind his back. PO Messina punched § 87(2)(b) in the head (**Allegation C: Force**, § 87(2)(g)). § 87(2)(b) was placed in handcuffs. PO Messina and PO Zucker then forcibly took § 87(2)(b) to the ground (**Allegation D and E: Force**, § 87(2)(g)). § 87(2)(b) was placed in handcuffs and taken back to the stationhouse by unidentified officers who responded to the incident as back up. PO Zucker searched the vehicle parked on the sidewalk under the supervision and instruction of Sergeant John Nicolosi of the 77<sup>th</sup> Precinct (**Allegation F: Abuse of Authority**, § 87(2)(g)).

§ 87(2)(b) was arrested as a result of this incident for § 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

Two body-worn camera (BWC) videos from PO Messina and PO Zucker were provided in relation to this complaint [BR03 and BR04].

### Allegation (A) Discourtesy: Police Officer Christopher Messina spoke discourteously to

§ 87(2)(b)

### Allegation (B) Discourtesy: Police Officer Joshua Zucker spoke discourteously to

§ 87(2)(b)

§ 87(2)(b)

It is undisputed that PO Zucker and PO Messina approached § 87(2)(b) and § 87(2)(b) who were working on § 87(2)(b)'s truck, which was parked on the side of the road. § 87(2)(b)'s vehicle was parked on the sidewalk next to the truck. It is also undisputed that § 87(2)(b) did not have any form of identification on him, provided a fake name, and refused to provide his real name when repeatedly asked by PO Zucker. It is further undisputed that PO Zucker and PO Messina used profanity toward § 87(2)(b).

BWC footage from PO Zucker captures PO Zucker telling § 87(2)(b) repeatedly at 06:48 minutes into the video to turn around and put his hands behind his back. § 87(2)(b) appears to physically resist being handcuffed. § 87(2)(b) says, § 87(2)(b) "don't fight them, please don't fight them." PO Zucker says, "Woah my arm is underneath you." At 07:14 minutes, PO Messina states, "Put your hands behind your back. Put your fucking hands behind your back." § 87(2)(b) yells something back at PO Messina but it is unclear what he is saying. The footage is unclear but there appears to be the sound of handcuffs clicking. § 87(2)(b) says, "Go ahead, have fun motherfucker. You bitch ass punk, pussy ass nigger." § 87(2)(b) then yells, "These niggers are a pussy ass bitch." While § 87(2)(b) continues to yell, PO Zucker tells him "Shut up. Shut the fuck up." § 87(2)(b) continues yelling, "Niggers try to do the

right shit and niggers that do the wrong shit run and this pussy ass nigger doesn't have the energy to run. They just want to fuck with niggers that do the right shit. Suck my dick you punk ass motherfuckers." At 08:05 minutes, PO Zucker tells § 87(2)(b) "Get the fuck off my arm." § 87(2)(b) asks why. PO Zucker tells him because he says so [BR04].

PO Zucker's BWC footage was played for PO Zucker during his interview. PO Zucker confirmed that he and PO Messina made the statements noted above. PO Zucker stated that he used profanity because § 87(2)(b) grabbed his hand, which put both he and § 87(2)(b) in a dangerous situation. PO Zucker furthered that he used profanity to get his point across [BR08].

The same portions of PO Zucker's BWC footage was played for PO Messina during his interview. He could not identify the voices in the footage using discourteous language [BR09].

In DAO-DCT case number 2017-17005, it was maintained by the trial commissioner that "profane remarks, made during stressful situations or while an officer is trying to get a chaotic situation under control, are not misconduct" [BR12].

§ 87(2)(g)

### **Allegation (C) Force: Police Officer Christopher Messina used physical force against**

§ 87(2)(b)

§ 87(2)(b) testified that after he provided his name and date of birth to the officers, PO Zucker told him to put his hands behind his back. § 87(2)(b) asked PO Zucker and PO Messina what he did wrong but neither officer answered him. § 87(2)(b) told him that he should listen to the officers and place his hands behind his back. PO Messina then punched § 87(2)(b) in the side of the head once. § 87(2)(b) was not yet handcuffed at this point. § 87(2)(b) did not fall and did not react in any way. § 87(2)(b)'s testimony for this allegation can be found from 23:58-29:55 minutes in the interview recording [BR13].

§ 87(2)(b) testified that PO Messina grabbed § 87(2)(b)'s right arm and PO Zucker grabbed § 87(2)(b)'s left arm. § 87(2)(b) did not physically resist in any manner. § 87(2)(b) was swearing at the officers. § 87(2)(b) did not recall which officer handcuffed § 87(2)(b) but stated that he was handcuffed. PO Messina then punched § 87(2)(b) in the face two times in quick succession. PO Zucker was holding § 87(2)(b) by his wrists when these punches occurred. § 87(2)(b)'s testimony for this allegation can be found from 15:20-24:35 minutes in the interview recording [BR07].

PO Messina testified that after § 87(2)(b) refused to provide his name and his tone and demeanor became "aggressive and irate," PO Zucker grabbed § 87(2)(b)'s wrist and PO Messina grabbed § 87(2)(b)'s other arm. § 87(2)(b) kept his arms tense and tight and physically resisted the officers' attempts to place his arms behind his back. PO Messina struck § 87(2)(b) with his right hand in a closed fist. PO Messina believed the strike made contact with § 87(2)(b) but did not recall where he contacted § 87(2)(b)'s body. PO Messina did not recall how § 87(2)(b) reacted to the hand strike. PO Messina stated that he used the hand strike because § 87(2)(b) was actively resisting arrest. PO Messina's testimony for this allegation can be found from 16:59-20:28 minutes, 26:10-28:21 minutes, and 28:50-29:03 minutes in the interview recording [BR09].

PO Zucker testified that after § 87(2)(b) refused to provide his name, he grabbed one of § 87(2)(b)'s arms and PO Messina grabbed his other arm. § 87(2)(b) stiffened his

body. PO Zucker and PO Messina repeatedly told § 87(2)(b) to put his arms behind his back but he refused to do so. § 87(2)(b) shifted and twisted his body side to side to try and stop the officers from handcuffing him. PO Messina punched § 87(2)(b) in the head while PO Zucker was attempting to get a grip on § 87(2)(b)'s arm. PO Zucker and PO Messina were then able to handcuff § 87(2)(b). PO Zucker's testimony can be found between 14:10-16:55 minutes and 32:45-34:40 minutes in the interview recording [BR08].

At 6:48 into PO Zucker's BWC footage, PO Zucker tells § 87(2)(b) repeatedly to turn around and put his hands behind his back. PO Zucker grabs § 87(2)(b)'s wrists. § 87(2)(b) appears to physically resist being handcuffed, and a scuffle ensues. § 87(2)(b) says, "§ 87(2)(b) don't fight them, please don't fight them." Given the proximity of the officers, BWC footage was unable to capture the exact actions of the officers [BR04].

§ 87(2)(g)

Patrol Guide Procedure 221-01 states that MOS will use only the reasonable force necessary to gain control or custody of a subject. In determining whether the use of force is reasonable, members of the service should consider the following:

- a. The nature and severity of the crime/circumstances
- b. Actions taken by the subject
- c. Duration of the action
- d. Immediacy of the perceived threat or harm to the subject, members of the service, and/or bystanders
- e. Whether the subject is actively resisting custody
- f. Whether the subject is attempting to evade arrest by flight
- g. Number of subjects in comparison to the number of MOS
- h. Size, age, and condition of the subject in comparison to the MOS
- i. Subject's violent history, if known
- j. Presence of hostile crowd or agitators
- k. Subject apparently under the influence of a stimulant/narcotic which would affect pain tolerance or increase the likelihood of violence. [BR17].

§ 87(2)(g)

**Allegation (D) Force: Police Officer Christopher Messina used physical force against**

§ 87(2)(b)

**Allegation (E) Force: Police Officer Joshua Zucker used physical force against § 87(2)(b)**

§ 87(2)(b) testified that he was in handcuffs when PO Messina grabbed his foot and lifted it off the ground. PO Zucker held § 87(2)(b) by his arms. § 87(2)(b) lost his balance when his foot was lifted off the ground. His arms swung backwards in an attempt to keep his balance. § 87(2)(b) was later informed that his elbow hit PO Messina. § 87(2)(b) proceeded to fall on his stomach. § 87(2)(b)'s testimony can be found from 29:55-32:08 minutes in the interview recording [BR13].

§ 87(2)(b) testified that after § 87(2)(b) was placed in handcuffs, PO Messina grabbed § 87(2)(b) by his leg and arm. PO Zucker grabbed § 87(2)(b) by his other leg. PO Messina and PO Zucker attempted to pull § 87(2)(b) to the ground but he was able to stay on his feet. PO Messina and PO Zucker then successfully pulled § 87(2)(b) to the ground. § 87(2)(b) landed on his right side. During this process, PO Messina exclaimed that his tooth had been hit. § 87(2)(b) stated that he thought § 87(2)(b)'s elbow or shoulder accidentally hit PO Messina and chipped his tooth as he was being taken to the ground. § 87(2)(b)'s testimony can be found from 24:35-30:20 minutes in the interview recording [BR07].

PO Zucker testified that he and PO Messina handcuffed § 87(2)(b) while he was upright. § 87(2)(b) had his back to the officers and was facing a wall. In the process of handcuffing § 87(2)(b) PO Messina's tooth was chipped. PO Zucker did not recall how this happened. PO Messina became disoriented and went to look for the other part of his tooth. § 87(2)(b) grabbed PO Zucker's hand. In response, PO Zucker took § 87(2)(b) to the ground. PO Zucker did not recall how he took § 87(2)(b) to the ground. PO Zucker's testimony can be found from 16:55-18:02 minutes and 34:40-34:46 minutes in the interview recording [BR08].

PO Messina testified that § 87(2)(b) was taken to the ground, but he did not recall how this happened or whether this was involved. PO Messina stated that his tooth was chipped during a physical struggle with § 87(2)(b) but he did not recall how exactly that occurred. PO Messina did not recall if § 87(2)(b) was handcuffed while he was upright or when he was on the ground. PO Messina's testimony can be found between 21:50-26:10 minutes and 28:21-28:50 minutes in the interview recording [BR09].

TRI Reports filled out by PO Messina and PO Zucker both listed a forcible takedown used against § 87(2)(b). This force was listed as used in defense of themselves and other MOS. The TRI Report filled out by PO Messina included a picture of his chipped tooth [BR16 and BR 18].

BWC footage of PO Zucker at 08:47 minutes, PO Zucker tells § 87(2)(b) "Get the fuck off my arm right now." § 87(2)(b) asks why. PO Zucker says because he said so. § 87(2)(b) is in handcuffs and appears to be pushed up against a brick wall. § 87(2)(b) tells PO Zucker to stop pushing on his arms. PO Zucker tells § 87(2)(b) to stop resisting. § 87(2)(b) yells at PO Zucker, "You asshole." PO Zucker yells back "Why are you cursing?" A scuffle immediately ensues. At 09:05 minutes the footage becomes blurry and it sounds as if something is hitting the camera. PO Zucker tells PO Messina, "Foot on the ground, foot on the ground. Drop him, foot on the ground." A voice tells § 87(2)(b) to stop resisting. When the footage becomes clear again, § 87(2)(b) is laying on the ground on his back. The footage does not show how exactly § 87(2)(b) is taken to the ground. [BR04].

Patrol Guide procedure 221-01 states that members of the service shall not use any level of force on handcuffed or otherwise restrained subjects unless necessary to prevent injury, escape or to overcome active physical resistance or assault. [BR17].

§ 87(2)(g)

**Allegation (F) Sergeant John Nicolosi searched the vehicle in which § 87(2)(b) was an occupant.**

At 17:15 minutes into PO Zucker's BWC, Sgt. Nicolosi asks PO Zucker if he looked in the vehicle. PO Zucker says that he has not and proceeds to search the silver sedan parked on the sidewalk. He first searches the front passenger's seat. PO Zucker then searches the back-passenger's seat. PO Zucker walks around and searches the front driver's seat area. PO Zucker goes around to the rear passenger's door and opens the door. He pulls the backseats forward and searches the trunk. PO Zucker does not appear to remove anything from the vehicle [BR04].

Sgt. Nicolosi testified that he instructed PO Zucker to search § 87(2)(b)'s vehicle as he smelled a strong odor of recently burned marijuana coming from the vehicle. There was no one in the vehicle at the time, but the front door was open, and Sgt. Nicolosi was standing directly next to the vehicle. No marijuana or marijuana paraphernalia was recovered in the search of the vehicle [BR27].

PO Zucker testified that he did not recall searching the vehicle. BWC footage from PO Zucker, which depicted him searching the vehicle, did not assist in his independent recollection of the incident [BR08]. Neither PO Zucker nor PO Messina, who were interviewed prior to Sgt. Nicolosi, mentioned an odor of marijuana during their recount of the incident.

During a follow up phone call, § 87(2)(b) stated that he smoked marijuana in the evenings when he was at home but had not smoked marijuana on the day of the incident. § 87(2)(b)

§ 87(2)(b) stated that there was no marijuana in the vehicle that was parked on the sidewalk. § 87(2)(b)

§ 87(2)(b) refused to answer when he last smoked marijuana prior to the incident. § 87(2)(b)

§ 87(2)(b) stated that he did not smell any marijuana during the incident. § 87(2)(b) stated that § 87(2)(b)

smokes marijuana, but he did recall if he had smoked marijuana that day [BR28].

When an officer detects the odor of marijuana coming from the parked vehicle of an individual, they are then given probable cause for a warrantless search of the individual's vehicle. People v. Norman, 142 A.D.3d 1107 (2016) [BR29].

§ 87(2)(g)

**Civilian and Officer CCRB Histories**

- § 87(2)(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- This is the first complaint § 87(2)(b) [REDACTED] has been party to [BR23].
- PO Zucker has been a member of service for six years. Over his tenure, he has been the subject of 11 allegations in six complaints. None of these allegations have been substantiated. Three of these complaints are still open. § 87(2)(g) [REDACTED]  
[REDACTED]
- PO Messina has been a member of service for four years. Over his tenure, he has been the subject of 12 allegations in five complaints. PO § 87(2)(g) [REDACTED]  
[REDACTED]
  - CCRB 201906247 contained an allegation of Force – Hit against inanimate object, which was substantiated and resulted in Command Discipline A.
- Sgt. Nicolosi has been a member of service for nine years. Over his tenure, he has been the subject of 19 allegations in 11 complaints. None of these allegations have been substantiated. § 87(2)(g) [REDACTED]  
[REDACTED]

#### **Mediation, Civil and Criminal Histories**

- This complaint was unsuitable for mediation due to the arrest of § 87(2)(b) [REDACTED] [BR05].
- According to the New York City Office of the Comptroller, § 87(2)(b) [REDACTED] and § 87(2)(b) [REDACTED] had not filed a Notice of Claim regarding this incident as of January 19, 2021 [BR24].
- § 87(2)(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- § 87(2)(b) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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Squad No.: 9

Investigator: Noah Kim Investigator Kim 03/01/2021  
Signature Print Title & Name Date

Squad Leader: Monique West IM Monique West   
Signature Print Title & Name Date

Reviewer:     
Signature Print Title & Name Date